UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JAMES BAYLEY,	)	
	)	
Plaintiff	)	
	)	
v.	)	*Civil No. 89-0157 P*
	)	
LIBERTY MUTUAL INSURANCE CO.,	)	
	)	
Defendant	)	

RECOMMENDED DECISION ON DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

This diversity suit arises out of injuries sustained by the plaintiff in an accident which occurred while he was working at the construction site of One City Center in Portland, Maine. At the time of the accident, the defendant was the workers' compensation insurance carrier for the plaintiff's employer. The gravamen of the complaint is the plaintiff's assertion that the defendant negligently breached a duty to provide loss prevention services and/or a defined loss prevention program to the plaintiff's employer and to the plaintiff. The defendant now seeks to dismiss the complaint for failure to state a claim or, in the alternative, for summary judgment. Because I conclude that this motion can properly be disposed of on the basis of the pleadings alone, I recommend that the court treat it strictly as one under Fed. R. Civ. P. 12(b)(6) to dismiss for failure to state a claim.

On a motion to dismiss, the material factual allegations of the complaint must be taken as true, *Cooper v. Pate*, 378 U.S. 546 (1964), and interpreted in the light most favorable to the plaintiff, *Roeder v. Alpha Industries, Inc.*, 814 F.2d 22, 25 (1st Cir. 1987). Applying those guidelines, the material facts are as follows. On January 4, 1985, while employed by Monitor Construction Company

(``Monitor") in the construction of One City Center, the plaintiff slipped and, due to the absence of adequate perimeter protection, fell from the fourth or fifth level of the building sustaining serious and permanent injuries. Pursuant to its various insurance contracts with Monitor and its affirmative conduct, the defendant undertook and assumed a duty to provide Monitor with loss prevention services and/or a defined loss prevention program at the construction site. The defendant's loss prevention program and services included at least three visits to the site by one or more of its loss prevention representatives, the observation of prevailing safety conditions, and recommendations for the improvement of perimeter protection for employee safety. The defendant negligently failed to ensure adequate perimeter protection at the construction site as a direct consequence of which the plaintiff fell and was injured.

Workplace accidents are covered by the Maine Workers' Compensation Act (``Act"), 39 M.R.S.A. '' 1-113. The Act is designed to ``eliminate litigation and transfer the burdens resulting from industrial accidents from the individual to the industry" and ``society as a whole." *Brown v. Palmer Construction Co.*, 295 A.2d 263, 265 (Me. 1972). Employees are protected against risks which they have not exclusively themselves created, *id.* at 266, and are granted a certainty of recovery in industrial accidents, *Roberts v. American Chain & Cable Co.*, 259 A.2d 43, 46 (Me. 1969). In exchange for these assurances the Act grants immunity from lawsuits to the employer who has secured payment of compensation in conformity with the Act for any injury ``arising out of and in the course of [an employee's] employment." 39 M.R.S.A. ' 4; *see also* 39 M.R.S.A. ' 28. The immunity granted by the Act is complete. The employee's right of action against his employer as existed at common law and certain other statutory rights are abrogated. *Roberts*, 259 A.2d at 46. A cause of action against an employer based on an injury arising out of the course of employment is barred by the exclusivity provisions of the Act. *Beverage v. Cumberland Farms Northern, Inc.*, 502 A.2d 486, 489 (Me. 1985).

The Act defines the parties to whom it applies. ``Employer" is defined as including ``private employers." 39 M.R.S.A. ' 2(1). The Act also provides that, ``[if] the employer is insured, the term `employer' includes the insurer unless the contrary intent is apparent from the context or is inconsistent with the purposes of this Act." *Id.* Thus, unless it is clear that the Legislature did not intend to equate the insurer and employer, or such inclusion of the insurer would conflict with the purposes of the Act, the insurer and employer are one in the same.

The foregoing notwithstanding, the plaintiff argues that his claim against his employer's insurer is not barred by the Act because the Act expressly allows for actions against third parties who are liable for the employee's injury. Specifically, the plaintiff contends that the defendant, independent of its contractual obligation to Monitor, owed him a duty of care and that it breached that duty when it failed to ensure the installation of adequate perimeter protection at the construction site. This duty, the plaintiff contends, transforms the defendant from an insurance carrier covered by the Act into a third party separately liable for his injuries. To support this argument the plaintiff relies on ' 68 of the Act[1] and 14 M.R.S.A. ' 167.[2]

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[1] Section 68 provides in relevant part:

> When an injury or death for which compensation or medical benefits are payable under this Act shall have been sustained under circumstances creating in some person other than the employer a legal liability to pay damages in respect thereto, the injured employee may, at his option, either claim such compensation and benefits or obtain damages from or proceed at law against such other person to recover damages.
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> If the injured employee elects to claim compensation and benefits under this Act, any employer having paid such compensation or benefits or having become liable therefor under any compensation payment scheme shall have a lien for the value of compensation paid on any damages subsequently recovered against the third person liable for the injury. If the employee or compensation beneficiary fails to

pursue his remedy against the third party within 30 days after written demand by an employer or compensation insurer in interest, the employer or compensation insurer shall be subrogated to the rights of the injured employee and shall be entitled to enforce liability in their own name or in the name of the injured party; the accounting for the proceeds to made on the basis provided.

. . . .

[2] 14 M.R.S.A. ' 167 provides in relevant part:

> **1. Exemption.** Subject to subsection 2 [notice requirements], the furnishing of, or failure to furnish, insurance inspection services related to, in connection with or incidental to the issuance or renewal of a policy of property or casualty insurance shall not subject the insurer, its agents, employees or service contractors to liability for damages from injury, death or loss occurring as a result of any act or omission by any person in the course of such services.
>
> . . . .
>
> **3. Exceptions.** This section shall not apply:
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> . . . .
>
> **B.** To any inspection services required to be performed under the provisions of a written service contract or defined loss prevention program.

Generally ' 68 allows an injured employee to sue a person other than the employer who may be liable for the employee's injury. This section also grants the employer the right to place a lien, up to the value of any compensation paid, on any damages the employee may recover from the third party. If the employee fails to pursue the third party upon the employer's request, the employer is then subrogated to the employee's rights. The plaintiff argues that ' 68 evidences a clear legislative intent that the employer and insurer be separated for the purposes of a ' 68 third-party suit, an intent he claims is manifested by the Legislature's use of the single word ``employer" in the first paragraph of the section compared to the use of ``employer" and ``compensation insurer" in the rest of the section. 39 M.R.S.A. ' 68. Thus, contends the plaintiff, the Legislature's ``contrary intent is apparent from the context" of the statute and insurers are not immune from third party suits for their independent acts of negligence. Stated otherwise, the term ``employer" as used in ' 68 must be read as excluding the insurer, ' 2(1) of the Act notwithstanding. In support of his analysis the plaintiff points to the fact that the Legislature has excepted from the liability exemption conferred on insurers by 14 M.R.S.A. ' 167(1) those inspection services required to be performed under the provisions of a written service contract or defined loss prevention program. 14 M.R.S.A. ' 167(3)(B).

The plaintiff's proffered construction of the statute is strained and is not supported by Maine case law.[3] While it is true that only the term ``employer" is used in the first paragraph of ' 68 and that both terms ``employer" and ``compensation insurer" are used in the succeeding paragraphs, there are

[3] The plaintiff has requested that this court certify the interpretation of ' 68 to the Maine Supreme Judicial Court. Although Maine law allows such certification of difficult questions of state law, certification is a procedure to be used sparingly and should not be used when the question of state law is, as here, reasonably clear. *Bi-Rite Enter., Inc. v. Bruce Miner Co.*, 757 F.2d 440, 443 n.3 (1st cir. 1985); 17A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* ' 4248 at pp. 172-73 (1988).

only two plausible explanations for this difference. One is that it is inadvertent and wholly without significance. In this regard it is apparent that when the Legislature amended ' 68 in 1969, *see* P.L. 1969, ch. 84, its focus was on expanding that section to allow an injured employee who has elected to claim benefits under the Act the opportunity to pursue his own claim against third parties. Previously, such rights of a similarly situated injured employee were automatically subrogated to a compensating employer. Thus, additions were made to ' 68 following what is now the first paragraph and preceding what is now the last paragraph, and the last paragraph was modified to add the complementary reference ``compensation insurer" after the term ``employer" consistent with the usage employed in the newly added middle two paragraphs. Given the purpose underlying the 1969 amendments, it is entirely understandable that the Legislature left the original language which now comprises the first paragraph altogether alone. This view is supported by the existence of another similar difference involving the terms ``employee," which appears alone in the first paragraph, and ``compensation beneficiary," which appears together with the term ``employee" in the second and third paragraphs. The compelled conclusion is that the Legislature did not intend thereby to deprive by exclusion a compensation beneficiary other than the employee (such as a deceased employee's dependents) from exercising the alternative rights conferred by the first paragraph of ' 68.

To the extent that the different usages employed in the first and subsequent paragraphs was purposeful, the defendant has offered the only other plausible explanation which is consistent with that view and with the purposes of the Act:

> In the alternative, it is possible that in drafting ' 68 the Legislature deliberately sought to distinguish between the employer and the insurer with respect to the disposition of the proceeds of a successful third party action, because it would be imprecise to say that the employee must reimburse the ``employer." The party entitled to reimbursement would be either the employer or the insurer,

> depending upon who had made the compensation payments, and the Legislature may have wished to make this distinction clear.

Memorandum in Opposition to Plaintiff's Motion to Strike Affirmative Defenses, and in Support of Defendant's Motion to Dismiss for Failure to State a Claim or for Summary Judgment at pp. 14-15.

Furthermore, the Law Court has recognized no distinction between the employer and the insurer for ' 68 purposes. In *Liberty Mutual Insurance Co. v. Weeks*, 404 A.2d 1006 (Me. 1979), a declaratory judgment action which sought to determine the extent of the insurer's lien, the court stated that ``[i]n the present circumstances we may treat the employer and its insurance carrier as `one.'" *Id.* at 1007 n.1. The court was more explicit in *Connell v. Aetna Life & Casualty Co.*, 436 A.2d 408 (Me. 1981): ``Section 68 of the Act affords the employer or his insurer which has paid compensation benefits under the Act the right to a lien against any amount recovered by the claimant in an action against a third person liable for the injury." *Id.* at 411. That the Law Court did not distinguish between the employer and insurer in *Connell* is significant in that the referenced language of ' 68 simply states that ``any employer having paid such compensation or benefits . . . shall have a lien for the value of compensation paid on any damages subsequently recovered against the third [party]." 39 M.R.S.A. ' 68.

In most cases the Law Court has held that the term ``employer" includes ``insurer." *See, e.g., Cline v. Wood*, 510 A.2d 530, 532 n.1 (Me. 1986); *Procise v. Electric Mutual Liability Insurance Co.*, 494 A.2d 1375, 1382 (Me. 1985). Only in unusual and limited circumstances where the Law Court has concluded that the basic policies of the Act are undermined has it construed the term ``employer" to exclude the insurer. In *Daigle v. Daigle*, 505 A.2d 778 (Me. 1986), the court decided that the two terms are not synonymous for purposes of the ' 63 notice provision of the Act in the limited circumstance where the injured person and claimant is self-employed. Noting that the policy

underlying the notice requirements of the Act is to assure prompt medical attention and to protect against false claims, the court found that requiring notice to the insurer where the injured claimant is also the employer does not further these policies and is unduly harsh, contravening the remedial nature of the statute. *Id.* at 779.

Including the term ``insurer" within the definition of ``employer" as that term is used in the first paragraph of ' 68 is clearly consistent with the purposes of the Act. Indeed, to construe the section as the plaintiff proposes would contravene the policies underlying the workers' compensation scheme. The Act was designed to reduce litigation and stabilize the cost of industrial accidents. *See Brown v. Palmer Construction Co.*, 295 A.2d at 265. The Law Court has consistently reaffirmed this policy by its steadfast refusal to allow claimants to avoid the Act through third-party actions[4] or inventive pleadings.[5] The plaintiff's construction of ' 68 would allow precisely the type of multiple litigation the Law Court has assiduously avoided.

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[4] *See Diamond Int'l Corp. v. Sullivan and Merritt, Inc.*, 493 A.2d 1043 (Me. 1985) (joint tortfeasor not entitled to recover from employer in third-party action amount equal to workers' compensation paid employee); *Roberts v. American Chain & Cable Co.*, 259 A.2d 43 (Me. 1969) (third-party action by products liability defendant against employer for value of workers' compensation benefits paid employee barred by Act). *See also Drake v. Raymark Indus., Inc.*, 772 F.2d 1007 (1st Cir. 1985), *cert. denied*, 476 U.S. 1126 (1986); *Gagne v. Carl Bauer Schraubenfabrick, GmbH*, 595 F. Supp. 1081 (D. Me. 1984).

[5] *See Beverage v. Cumberland Farms Northern, Inc.*, 502 A.2d 486 (Me. 1985) (unrepealed Employer's Liability Law does not provide employees covered by the Act a choice between the two); *McKellar v. Clark Equipment Co.*, 472 A.2d 411 (Me. 1984) (Act's grant of immunity from actions at common law also includes statutory enactments extending common law rights). The plaintiff in this case attempts to make an argument similar to that employed in *McKellar*. He claims that because the Legislature specifically exempted certain inspection services from a grant of immunity affecting insurance inspection services in general, *see* 14 M.R.S.A. ' 167, such exempted services are not subject to the immunity provisions of the Act. The plaintiff misconceives the significance of ' 167. Rather than broaden the scope of permissible actions involving inspection services, ' 167 narrowed it. Now, with certain limited exceptions, insurers are immune from lawsuits for negligently failing to perform such services. Contrary to the plaintiff's claim, the enactment of ' 167 evidences no legislative intent to limit a compensation insurer's immunity under the Act.

I conclude that the plaintiff's action clearly arises out of his employment and that the defendant, as compensation insurer, is immune from liability as asserted therein pursuant to the immunity provisions of the Act. Therefore, I recommend that the defendant's motion to dismiss be ***GRANTED***.

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 27th day of October, 1989.

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David M. Cohen
United States Magistrate